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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1915

LESTER L. PERKINS, D.V.M.,

Appellant,

—v.—

HOWARD SMITH, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

JURISDICTIONAL STATEMENT

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

JURISDICTIONAL STATEMENT

Appellant appeals from the judgment of the United States District Court for the District of Maryland entered on January 29, 1974 upholding the constitutionality of certain statutes of the United States and the State of Maryland, which exclude aliens admitted to the United States for permanent residence from serving as jurors in the courts of the United States and of the State of Maryland. Appellant submits this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

Opinion Below

The opinion of the three-judge statutory court of the United States District Court for the District of Maryland, is reported at 370 F. Supp. 134 and is set out in the Appendix, *infra,* pp. 11-28.

Jurisdiction

The judgment of the United States District Court for the District of Maryland was entered on January 29, 1974, and a notice of appeal was filed in that court on March 26, 1974. On May 16, 1974, Mr. Chief Justice Burger extended the time for filing this Jurisdictional Statement to and including June 24, 1974. The jurisdiction of the Supreme Court to review this decision by appeal is conferred by 28 U.S.C. Section 1253. The following decisions sustain the jurisdiction of this Court to review the judgment by appeal in this case: *Sugarman* v. *Dougall,* 413 U.S. 634 (1973), *Graham* v. *Richardson,* 403 U.S. 365 (1971).

Statutes Involved

Title 28 U.S.C. §1862:

"No citizen shall be excluded from service as a grand or petit juror in the district courts of the United States on acount of race, color, religion, sex, national origin, or economic status."

Title 28 U.S.C. §1865:

(a) "The chief judge of the district court, or such other district court judge as the plan may provide, on his initiative or upon recommendation of the clerk or jury commission, shall determine solely on the basis of information provided on the juror qualification form and other competent evidence whether a person is unqualified for, or exempt, or to be excused from jury service. The clerk shall enter such determination i

the space provided on the juror qualification form and the alphabetical list of names drawn from the master jury wheel. If a person did not appear in response to a summons, such fact shall be noted on said list.

(b) In making such determination the chief judge of the district court, or such other district court judge as the plan may provide, shall deem any person qualified to serve on grand and petit juries in the district court unless he—

(1) is not a citizen of the United States eighteen years old who has resided for a period of one year within the judicial district;

(2) is unable to read, write, and understand the English language with a degree of proficiency sufficient to fill out satisfactorily the juror qualification form;

(3) is unable to speak the English language;

(4) is incapable, by reason of mental or physical infirmity, to render satisfactory jury service; or

(5) has a charge pending against him for the commission of, or has been convicted in a State or Federal Court of record of, a crime punishable by imprisonment for more than one year and his civil rights have not been restored by pardon or amnesty."

Art. 51, Annotated Code of Maryland:

§1. Declaration of policy.

Whenever a litigant in a court of this State is entitled to trial by jury, he shall have the right to a petit jury

selected at random from a fair cross section of the citizens of this State resident in the county wherein the court convenes or in Baltimore City if the court convenes therein. Whenever a person is accused of an indictable criminal offense under the laws of this State, he shall have the right to a grand jury selected at random from a fair cross section of the citizens of this State resident in the county wherein the court convenes or in Baltimore City if the court convenes therein. All citizens of this State (1) shall have the opportunity to be considered for service on grand and petit juries in the courts of this state by maintaining their names on the roll of registered voters for State elections, and (2) shall have an obligation to serve as jurors when summoned for that purpose.

§2. Discrimination prohibited.

No citizen shall be excluded from service as a grand or petit juror in the courts of this State on account of race, color, religion, sex, national origin, or economic status.

Question Presented

Whether the statutes of the State of Maryland and of the United States, which forbid aliens who are admitted to the United States for permanent residence from serving on state and federal juries, violate the equal protection clause of the Fourteenth Amendment and the due process clause of the Fifth Amendment.

Statement of the Case

Appellant, a citizen of Jamaica, British West Indies, is an alien admitted to the United States for permanent residence. He received a Bachelor of Science degree in Animal Science from the Agricultural and Technical College in Greensboro, North Carolina, in 1964, and a degree in Doctor of Veterinary Medicine in 1968.

At the time this suit was filed in March 1973, appellant had resided in the State of Maryland for fourteen months. He met all the requirements for service as a juror in the state and federal courts in Maryland, except for his being an alien.

In March, 1973, alleging his willingness and desire to serve as a juror, appellant filed the instant action in the United States District Court for the District of Maryland. He contended that both the federal statute, 28 U.S.C. §1865, and the Maryland statutes, Article 51, §1, Annot. Code of Maryland (1972 Replacement Vol.), which exclude resident aliens from jury service, violated the Fifth and Fourteenth Amendments. The defendants were various state and federal court officials and government bodies. A three-judge court was convened and the case was heard on cross motions for summary judgment.

On January 28, 1974, the three-judge court issued its decision, holding that the exclusion of permanent resident aliens from eligibility for federal and state jury service did not deny the appellant the equal protection of the laws. District Judge Murray, writing for himself and District Judge Watkins, reasoned that the federal and state governments have a compelling interest in confining jury ser-

vice to citizens. They identified that interest as "assuring that those who make the ultimate factual decisions on issues of personal liberty and property rights under our system of justice be either native born or naturalized citizens, because it may fairly be concluded that as a class they are more likely to make informed and just decisions in such matters than are non-citizens." App., *infra*, p. 16. Circuit Judge Winter concurred, rejecting some of the reasons offered for the exclusion, but concluding that there is a "substantial interest in restricting eligibility for jury service to persons likely to have a personal commitment to the proper application and enforcement of the laws of the United States and the several states." App., *infra*, p. 28.

The Question Is Substantial

The issue in this case is whether exclusion of resident aliens from service on state and federal juries is justified by a compelling state interest, for the court below, noting that "the defendants are willing to measure the statutes here against either [the compelling state interest or rational basis] test," determined that it "need look only to whether the stricter standard . . . has been satisfied."[1]

[1] The federal defendants claimed that the strict scrutiny test does not apply under the Fifth Amendment's due process analog to equal protection, relying upon *Flemming* v. *Nestor*, 363 U.S. 603 (1959). Defendants' Opposition to Plaintiff's Motion for Summary Judgment, pp. 2-3, n. 1. There are two short answers to that claim. First, in *Bolling* v. *Sharpe*, 347 U.S. 497 (1954), the Court, though asserting that due process and equal protection are not "always interchangeable phrases" (at 499), nonetheless acknowledged that "Classifications based upon race [a suspect classification like alienage] must be scrutinized with particular care . . ." (*ibid.*). Second, *Flemming* was not argued as an "equal protection" case

App., *infra*, p. 15. There is no question, of course, but that where alienage is the basis upon which a statutory disadvantage rests, the strict scrutiny test must be applied. *Takahashi* v. *Fish and Game Commission*, 334 U.S. 410 (1948); *Graham* v. *Richardson*, 403 U.S. 365 (1971); *In re Griffiths*, 413 U.S. 717 (1973); *Sugarman* v. *Dougall*, 413 U.S. 634 (1973).

The court below found the required compelling state interest to consist "in the final analysis . . . in assuring that those who make the ultimate factual decisions on issues of personal liberty and property rights under our system of justice be either native born or naturalized citizens, because it may fairly be concluded that as a class they are more likely to make informed and just decisions in such matters than are non-citizens." App., *infra*, p. 16. That conclusion is in direct conflict with this Court's recent decisions in *Sugarman* v. *Dougall*, *supra*, and *In re Griffiths*, *supra*. The substantial question to be resolved, therefore, is whether the prohibition against service by resident aliens as jurors is, as a constitutional matter, demonstrably more compelling than a prohibition against aliens practicing law or serving as state employees. Analysis of *Sugarman* and *Griffiths* compels a negative answer.

In deciding that aliens might constitutionally be barred from jury service, the court below first characterized the jury system, quite correctly, as "one of the institutions at the heart of our system of government" (App., *infra*, p. 19). It then proceeded from there to the conclusion that

involving appellee's status as an alien. Rather, the statute involved there was said to violate the constitutional prohibitions against cruel and unusual punishment, bills of attainder and ex post facto laws, and to invade first amendment rights.

it was justifiable to exclude aliens from that system for the following reasons (App., *infra*, pp. 19-20):

> (1) it is reasonable to limit jury service "to those who participate in and manifest an interest in the affairs of citizenship . . .";
>
> (2) aliens are less qualified because less familiar with local laws, customs and language;
>
> (3) aliens do not owe sole and permanent allegiance to the United States;
>
> (4) an unprincipled alien juror could "even direct the course of justice into channels deliberately chosen for their deleterious effect on this country";
>
> (5) aliens could return to their country of origin.[2]

Virtually these same reasons were put forward in *Sugarman* and *Griffiths* to justify the exclusion of aliens from state employment and from the practice of law, yet this Court found them constitutionally insufficient.

In *Sugarman*, the state rested on the argument that "the civil servant 'participates directly in the formulation and execution of governmental policy,' and thus must be free of competing obligations to another power." 413 U.S. at 641. The Court rejected that argument as too imprecise to satisfy the "necessary strict scrutiny." The Court also rejected as unproven, and probably unprovable, the same

[2] Judge Winter, concurring, relied less broadly on the single assumption that citizenship alone can demonstrate "commitment to the laws which it is the juror's obligation to apply" (App., *infra*, pp. 22, 24), though he conceded that "personal commitment is not susceptible of objective measurement" (App., *infra*, p. 27).

assertion made in the case at bar that resident aliens are more likely to be transient (*id.* at 645).

In *Griffiths*, which is even closer to the case at bar than *Sugarman*, the Court rejected as too sweeping a blanket ban on the practice of law by resident aliens which rested on the assumption of "a resident alien's possible conflict of loyalties." 413 U.S. at 724. The Court held that the state "simply has not established that it must exclude all aliens from the practice of law in order to vindicate its undoubted interest in high professional standards." *Id.* at 727.

The question therefore is posed whether service as a juror is so qualitatively distinctive from service as an attorney, or as a state employee—both of which surely go to "the heart of our system of government"—that it justifies the kind of sweeping prohibition rejected in *Griffiths* and *Sugarman*. We think not.

The decision below rests entirely on speculative assumptions about the subjective motivations and loyalties of resident aliens which, in that court's view, would immediately jeopardize the integrity of the jury system. But the problematic impact on the justice system by resident-alien jurors is obviously neither more nor less than the impact on that system by resident-alien lawyers. Indeed, if one accepts the undifferentiated suspicion of the alien mentality reflected in the decision of the court below, we would have to conclude that, in all likelihood, alien lawyers could wreak more consistent havoc on our justice system than the occasional service of an alien juror. But this Court of course dismissed that grossly over-simplified perspective specifically in *Griffiths*, as well as in *Sugarman*. Thus here, as in those cases, both the state and federal governments

should be required equally to serve fifth and fourteenth amendment principles by requiring discrete and personalized inquiry into the qualifications of alien jurors, rather than resting upon invidious assumptions on a wholesale basis.

CONCLUSION

For the reasons stated above, jurisdiction should be noted.[3]

Respectfully submitted,

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[3] A further reason for noting jurisdiction is to allow this case to be heard together with *Hampton* v. *Mow Sun Wong*, No. 73-1596, cert. granted June 10, 1974, which involves the closely related question of the constitutionality of the prohibition against employment of aliens by the federal government.

APPENDIX

Opinion of the District Court

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil No. 73-222-HM

LESTER L. PERKINS, D.V.M., Individually and/or for similarly situated persons and as a class action,

—v.—

HOWARD SMITH, Clerk, Circuit Court for Montgomery County, JURY COMMISSIONER, Circuit Court for Montgomery County, MONTGOMERY COUNTY, MARYLAND, a governmental body, PAUL SCHLITZ, Clerk, United States District Court, UNITED STATES OF AMERICA, and STATE OF MARYLAND, and their successors in office or title or authority.

Filed: January 28, 1974

MURRAY, District Judge:

Plaintiff Lester L. Perkins, a resident alien, successfully asserted before a three-judge panel of this Court that the State of Maryland may not constitutionally bar him from being examined for or licensed as a doctor of veterinary medicine solely because of his alienage.[1] In the present

[1] Perkins v. Board of Veterinary Medical Examiners of Maryland, Civil No. 72-1174-HM. Judgment was entered for the plaintiff on March 16, 1973, following an oral opinion in the matter rendered at a hearing held on March 2, 1973.

case he has again invoked the jurisdiction of a three-judge court to challenge his exclusion from service in Maryland on grand and petit jury panels in the state and federal courts solely because of his alienage.

As originally brought, plaintiff sought to represent a class—aliens otherwise qualified who were willing to serve as jurors. At the argument, after the difficulties this would present were pointed out, counsel for plaintiff asked leave orally to amend the complaint by striking out the qualification relating to willingness. Leave to amend was granted. There are, however, grave doubts as to whether even as so limited, aliens would constitute a "cognizable group", since its composition would vary from day to day with immigration, emigration and naturalization; as distinguished from the recognized cognizable groups based on sex, religion, color and race.

Laws of the state and nation make clear that jurors must be citizens of the United States.[2] Plaintiff claims the stat-

[2] 28 U.S.C. §1865 provides:

§1865. Qualifications for jury service

(a) The chief judge of the district court, or such other district court judge as the plan may provide, on his initiative or upon recommendation of the clerk or jury commission, shall determine solely on the basis of information provided on the juror qualification form and other competent evidence whether a person is unqualified for, or exempt, or to be excused from jury service. . . .

(b) In making such determination the chief judge of the district court, or such other district court judge as the plan may provide, shall deem any person qualified to serve on grand and petit juries in the district court unless he—

(1) is not a citizen of the United States eighteen years old who has resided for a period of one year within the judicial district;

* * * * *

The Maryland statutes are not so explicit. Article 51, §1, Annot. Code of Maryland (1972 Replacement Vol.) provides:

utes imposing this citizenship requirement for jurors deny to him and others like him equal protection of the laws comprehended in the guarantees of the Fifth and Fourteenth Amendments to the Constitution of the United States.

Plaintiff urges that it cannot be disputed that aliens are "persons" within the protection of the equal protection

§1. Declaration of policy.

Whenever a litigant in a court of this State is entitled to trial by jury, he shall have the right to a petit jury selected at random from a fair cross section of the citizens of this State resident in the county wherein the court convenes or in Baltimore City if the court convenes therein. Whenever a person is accused of an indictable criminal offense under the laws of this State, he shall have the right to a grand jury selected at random from a fair cross section of the citizens of this State resident in the county wherein the court convenes or in Baltimore City if the court convenes therein. All citizens of this State (1) shall have the opportunity to be considered for service on grand and petit juries in the courts of this state by maintaining their names on the roll of registered voters for State elections, and (2) shall have an obligation to serve as jurors when summoned for that purpose.

Section 2 of the same Article reads:

§2. Discrimination prohibited.

No citizen shall be excluded from service as a grand or petit juror in the courts of this State on account of race, color, religion, sex, national origin, or economic status.

Section 6(b) reads, in relevant part:

. . . the jury [*sic*] judge shall deem any person qualified to serve on grand or petit juries unless he—

(i) Is not constitutionally qualified to vote in this State in the county wherein the court convenes or Baltimore City if the court convenes therein, or;

(ii) Is unable to read, write, or understand the English language with a degree of proficiency sufficient to fill out satisfactorily the juror qualification form, or;

(iii) Is unable to speak the English language or comprehend spoken English. . . .

It is clear from these sections that Maryland statutes exclude aliens from jury duty.

clause of the Fourteenth Amendment.[3] He contends that distinctions based on alienage have been held to be invidious, suspect, and subject to close judicial scrutiny.[4] Finally, he submits that no compelling state or federal interest justifies the disqualification of aliens as a class from jury service.

In support of these points, he places principal reliance on *Graham* v. *Richardson,* 403 U.S. 365, 91 S.Ct. 1848 (1971), which held that states could not exclude aliens from welfare benefits. Further, he cites two recent decisions handed down by the Supreme Court since the present suit was filed. *Sugarman* v. *Dougall,* 93 S.Ct. 2842, and *In re Griffiths,* 93 S.Ct. 2851. These cases, both decided on June 25, 1973, held that citizenship could not be made a prerequisite for holding a certain class of civil service employment in the State of New York (*Sugarman*) or for admission to the bar in the State of Connecticut (*Griffiths*).

Defendants make the argument that those cases which have extended constitutional protection to aliens have concerned not political but economic rights. Thus, in a long line of cases since 1915 the courts have considered as invalid state discriminations against aliens which tended to interfere with the means to a livelihood.[5]

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[3] Plaintiff cites, for these propositions, Takahashi v. Fish and Game Commission, 334 U.S. 410, 68 S.Ct. 1168 (1948), and Graham, infra.

[4] Graham v. Richardson, 403 U.S. 365, 91 S.Ct. 1848, 29 L.Ed.2d 534 (1971).

[5] Truax v. Raich, 239 U.S. 33, 36 S.Ct. 7 (1915) (Arizona anti-alien labor law held unconstitutional); Takahashi v. Fish and Game Commission, 334 U.S. 410, 68 S.Ct. 410 (1948) (California statute prohibiting persons "ineligible for citizenship" from obtaining a commercial fishing license); Graham v. Richardson, 403 U.S. 365, 91 S.Ct. 1848 (1971) (Arizona and Pennsylvania welfare restrictions on aliens held unconstitutional); Miranda v. Nelson, 351 F. Supp. 735 (D. Ariz. 1972) (Arizona constitutional and statutory provisions barring employment of aliens in social service and educational positions held invalid); Chapman v. Gerard, 456 F.2d 577 (3rd Cir. 1972) (statute barring aliens from participation in territorial scholarship fund unconstitutional); Sugarman v. Dougall, 93 S.Ct. 2851 (1973) (denial to alien of certain class of civil service employment in State of New York unconstitutional); In re Griffiths, 93 S.Ct. 2851 (1973) (Connecticut exclusion of aliens from practice of law unconstitutional); Perkins v. Board, Civil Action 72-1174 (D. Md. 1973) (Maryland statute barring alien from being examined for or issued license as doctor of veterinary medicine unconstitutional).

Additionally, defendants contend that whether the test to sustain a restriction of jury service to citizens be "compelling state interest" or "rational basis", the federal and state statutes here involved can be sustained under either standard.[6]

Since the defendants are willing to measure the statutes here against either test, the Court need look only to whether the stricter standard of compelling interest has been satisfied, although, as said in *Sugarman, supra,* p. 648 (in connection with qualification for office) "our scrutiny will not be so demanding where we deal with matters resting firmly within a State's constitutional prerogatives." . . . in exclusions "from participation in its democratic political institutions."

In *Carter* v. *Jury Commissioner,* 326 U.S. 320 (1970), the Court stated at page 332:

> The states remain free to confine the selection [of jurors] to citizens . . .

---

[6] Defendants Paul Schlitz and the United States, while contending that the "compelling interest" test has evolved under the Fourteenth Amendment as a limitation on state rather than federal action, maintain that the federal statute "would fully withstand scrutiny" under such a test were it deemed applicable to the federal government.

While this was dictum, it was significant dictum since it represented a construction and limitation of the Court's specific holding. The language was that of a unanimous court of eight. *Graham* was decided one year later by the same eight Justices plus Mr. Justice Blackmun. No overruling of the *Carter* dictum is expressed or can be inferred.

Various reasons are advanced as upholding alien disqualification from jury service—that it is reasonable to limit such service to those who participate in and manifest an interest in the affairs of citizenship, that aliens as a class will be less qualified than citizens from the standpoint of familiarity with local laws, customs and language to fully understand the actions and motives of litigants, that aliens do not owe sole and permanent allegiance to the United States, and that jury service is a unique responsibility going to the heart of representative government and as such should be entrusted only to citizens.

Do the State of Maryland and the United States have a compelling interest in confining service on grand and petit juries to citizens?

In the view of this Court, both governments have such an interest. That interest in the final analysis is in assuring that those who make the ultimate factual decisions on issues of personal liberty and property rights under our system of justice be either native born or naturalized citizens, because it may fairly be concluded that as a class they are more likely to make informed and just decisions in such matters than are non citizens. Black's Law Dictionary defines an alien as "a person resident, in one country, but owing allegiance to another. . . . In the United States, one born out of the jurisdiction of the United States, and who has not been naturalized under their constitution

and laws." On the other hand, a citizen is "One who, under the constitution and laws of the United States, or of a particular state, and by virtue of birth or naturalization within the jurisdiction, is *a member of the political community,* owing allegiance and being entitled to the enjoyment of full civil rights" (Emphasis supplied).

In *Sugarman, supra,* the Court found the particular New York Civil Service Law under review too broad and imprecise. Although rejecting a flat ban on the employment of aliens in positions with little if any relation to a State's legitimate interest, the Court went on to point out it was not holding that a State may not, in an appropriately defined class of positions, require citizenship as a qualification for office. Such power, the Court said

> "inheres in the State by virtue of its obligation, already noted above, 'to preserve the basic conception of a political community.' *Dunn* v. *Blumstein,* 405 U.S., at 344. And this power and responsibility of the State applies not only to the qualifications of voters, but also to persons holding state elective or important nonelective executive, legislative, and judicial positions, for officers who participate directly in the formulation, execution, or review of broad public policy or perform functions that go to the heart of representative government. There, as Judge Lumbard phrased it in his separate concurrence, is 'where citizenship bears some rational relationship to the special demands of the particular position.' 339 F.Supp., at 911."

This Court considers that grand and petit jurors in both state and federal courts are "persons holding . . . important nonelective . . . judicial positions", that they participate

directly in the execution of the laws and "perform functions that go to the heart of representative government." Blackstone considered juries as "the best investigators of truth, and the surest guardians of public justice." The institution of jury trial, he said, "preserves in the hands of the people that share which they ought to have in the administration of public justice, and prevents the encroachments of the more powerful and wealthy citizens." [7] In No. 83 of The Federalist, Alexander Hamilton, after referring to the "high estimation" in which he held the institution of jury trial, concluded that "it would be altogether superfluous to examine to what extent it deserves to be esteemed useful or essential in a representative republic, or how much more merit it may be entitled to as a defense against the oppressions of an hereditary monarch, than as a barrier to the tyranny of popular magistrates in a popular government. Discussions of this kind would be more curious than beneficial, as all are satisfied of the utility of the institution, and of its friendly aspect to liberty." [8]

It is not too much to conclude, therefore, that trial by jury is one of the chief underpinnings in the Anglo-Saxon system of justice, which in turn is one of the principal foundations of this nation. Juries at several levels make very difficult and essentially unreviewed determinations of fact. Grand juries decide which persons must answer to the state for alleged misdoings; petit juries resolve once and for all, and with only minimal supervision, issues of fact on which depend broad issues of law. It is really juries who are the final arbiters of truth and consequently of justice. It is therefore not difficult for this Court to conclude that

[7] 3 Blackstone Commentaries, Sec. 380.

[8] The Federalist No. 83, at 562 (J. Cooke Ed. 1961) (Hamilton).

the jury is one of the institutions at the heart of our system of government.

In maintaining the jury system as "the very palladium of free government" the states logically can anticipate that native-born citizens would be conversant with the social and political institutions of our society, the customs of the locality, the nuances of local tradition and language. Likewise naturalized citizens, who have passed through the citizenship classes sponsored by the Immigration and Naturalization Service, have demonstrated a basic understanding of our form of government, history and tradition. There is no corresponding basis for assuming that resident aliens, who owe allegiance not to any state or to the federal government, but are subjects of a foreign power, have so assimilated our societal and political mores that an equal reliance could be placed on their performing as well as citizens the duties of jurors in our judicial system.

The nature of the operation of juries makes it apparent that persons unfit for jury service can work a great deal of harm, through inability or malice, to efficiency and fairness. Jury deliberations are perhaps the most secret form of decision-making in the nation; the means of persuasion used by jurors on each other are never revealed. A single juror who failed to understand the import of the evidence being presented or who lacked any concern for the fairness of the outcome could severely obstruct or distort the course of justice. A single persuasive and unprincipled juror could even direct the course of justice into channels deliberately chosen for their deleterious effect on this country. We conclude, therefore, that the state has a compelling interest in the restriction of jury service to those who will be loyal to, interested in, and familiar with, the customs of this country.

Resident aliens by definition have not yet been admitted to citizenship. Until they become citizens, they remain in most cases legally bound to the country of their origin. Nothing is to prevent their return to that country, or a move to yet a third nation. It is true that many, if not most, aliens do intend to become citizens, and that their loyalty could probably be counted upon. However, it is the process of filing for citizenship that establishes that loyalty; any attempt at prior screening would undercut the efficiency and significance of existing procedures. Therefore, although the presumption that all aliens owe no allegiance to the United States is not valid in every case, no alternative to taking citizenship for testing allegiance can be devised, so that we conclude that the classification is compelled by circumstances, and that it is justifiable.

Service on juries is the prime example of an instance "where citizenship bears some rational relationship to the specific demands of the particular position."[9] This has been explicitly recognized, by dictum if not by holding, in several Supreme Court cases which have dealt with juror qualifications under the Fourteenth Amendment.[10]

While this Court has lately ruled as to this same plaintiff that the Equal Protection Clause provides a shield against denial of his right to practice veterinary medicine on grounds of alienage, it now also rules that the Clause does not bar his disqualification on grounds of alienage from the unique responsibilities of jury service. Such service may appropriately be limited to citizen members of the political community.

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[9] Concurring opinion of Judge Lumbard, Sugarman v. Dougall, 339 F.Supp. at 911.

[10] Carter v. Jury Commissioner, 396 U.S. 320 (1970); Strauder v. West Virginia, 100 U.S. 303 (1880); Jugiro v. Brush, 140 U.S. 291 (1891).

In this case defendant Montgomery County has moved to be dropped as a party under Rule 21. The County contends that it has no control over the qualifications for jurors and their selection which are provided for by Public General Law of the State of Maryland codified in Article 51, Annotated Code of Maryland. Since the Clerk of the Circuit Court for Montgomery County, the Jury Commissioner and the State of Maryland remain as parties, adequate relief to the plaintiff could be provided were this Court's determination reversed on appeal. Therefore, the Court will grant the motion of Montgomery County to be dropped as a party.

Accordingly, it is this 28th day of January, 1974,

ORDERED:

(1) That the motion of defendants for summary judgment be, and the same hereby is, *Granted;*

(2) That the motion of plaintiff for summary judgment be, and the same hereby is, *Denied;*

(3) That the motion of defendant Montgomery County to be dropped as a party be, and the same hereby is, *Granted.*

R. DORSEY WATKINS
United States District Judge

HERBERT F. MURRAY
United States District Judge

I concur in the judgment of the Court for the reasons separately stated.

HARRISON L. WINTER
United States Circuit Judge

WINTER, Circuit Judge, concurring:

I readily concur in the judgment of the court and I agree with much of what is said in its opinion. The differences, if any there be, between my views and those of the majority, lie in the articulation of the precise basis on which the judgment rests. Because I would prefer to make sharper definitions than those made by the majority, I proceed to state my separate views:

Notwithstanding that *Sugarman*[1] and *Carter*[2] contain suggestions to the contrary, I agree with the majority that the outcome of this case should depend upon whether a compelling state interest justifies the requirement that the selection of jurors be confined to persons who are citizens, because alienage is a suspect classification. Defendants assert that resident aliens, as a class, lack three general characteristics that are prerequisites to minimally proficient jury service: (1) familiarity with language; (2) familiarity with the laws and customs of the jurisdiction served by the jury panel; and (3) commitment to the laws which it is the juror's obligation to apply. Because it may reasonably be assumed, so the argument runs, that individual members of the class will lack one or more of these characteristics, the government (federal and state) has a compelling

[1] In Sugarman v. Dougall, 413 U.S. 634, 648 (June 25, 1973), Mr. Justice Blackmun, writing for the court, stated that while state action in regard to voter qualifications is not immune from scrutiny under the equal protection clause, that scrutiny will not be "so demanding" where the state action is within the state's constitutional prerogatives. Examples given were the state's right to require citizenship as a prerequisite to holding public office and to voting. The analogy to jury service is manifest.

[2] In Carter v. Jury Commissioner, 326 U.S. 320, 332 (1970), there is the flat statement that the states may "confine the selection [of jurors] to citizens." The statement, however, is only dictum.

interest in excluding all of the members of the class from jury service. I will examine these various characteristics and the reasonable necessity for exclusion of jurors on the grounds of each, seriatim.

With regard to the first two asserted characteristics, certainly native born citizens *as a class* are more likely to be familiar with our language, customs and laws than resident aliens *as a class*.[3] The only basis for the assertion that naturalized citizens have a greater familiarity with such subjects than resident aliens is the fact that successful completion of the naturalization process requires that the naturalized citizen pass certain examinations designed to demonstrate that he has an adequate familiarity with such subjects. Defendants contend that they are entitled to rely upon the tests administered by the Bureau of Immigration and Naturalization to separate the class of persons who are not citizens by birth into those who are qualified for effective jury service (those who have been naturalized) and those who are not (those who have not yet been naturalized). I do not think that such reliance survives close judicial scrutiny. There is obviously a less drastic means of ensuring that a prospective resident alien juror is sufficiently proficient in English and sufficiently

[3] There are, of course, exceptions in each category. There is a clearly definable minority of native born citizens who speak, write and understand only a language other than English. The United States is sufficiently large and diverse that regional differences in the usage and meaning of some aspects of English exist. Similarly, there are regional differences in the mores affecting interpersonal relationships. These differences become operative as the mobility of citizens within the United States increases. Many aliens, and undoubtedly plaintiff is one, speak and understand a purer form of English than many Americans, and undoubtedly many aliens adhere to political and personal mores not dissimilar to those possessed by American citizens. I believe, however, that these are the exceptions rather than the rule.

familiar with our laws and customs to serve effectively. Albeit, with some administrative inconvenience and burden, defendants could condition the eligibility of resident aliens for jury service upon their successful completion of examinations comparable to those administered by the Bureau of Immigration and Naturalization. By that means a resident alien could establish that he has sufficient knowledge to serve effectively as a juror, without being required to abandon the legal relationship he enjoys with his present sovereign. It should be noted, however, that any examination, whether for naturalization or solely to establish jury eligibility, could only demonstrate *knowledge* of American language, customs and laws; it could not measure sympathy with or willingness to be governed by American customs and laws or to apply them. Were this not a case of a suspect classification requiring close judicial scrutiny, I would be persuaded that the administrative convenience of relying upon the naturalization process would justify imposing this additional burden on the class discriminated against. However, since defendants *could* create an examination system which would ensure that resident aliens applying for jury service possess adequate familiarity with our language, customs and laws,[4] I would rest the judgment upon adoption of the third justification relied upon by the defendants.

Defendants contend that effective jurors should have, in addition to minimal knowledge of language, laws and customs, a commitment to uphold the laws of the United States

[4] There has been no insuperable administrative problem in identifying and excluding from jury service those persons, otherwise eligible, who lack a sufficient knowledge of English or who are so deficient in cognitive skills and understanding as to render them inefficient jurors.

and the several states, both by observance and application. I agree. The desirability of such a commitment is particularly compelling in the case of grand jurors who are charged with the responsibility of determining whether the prosecution of alleged violations of the criminal law shall go forward. A grand juror who cares little whether the laws of the United States are vindicated could undermine substantially the government's effort to obtain even-handed enforcement of the criminal laws. As the majority points out, it is no less desirable that petit jurors have a commitment to uphold the laws of the United States and the several states. Although petit juries are instructed as to their obligation to apply the law, it cannot be denied that, at least in criminal cases, petit juries have an unreviewable power to nullify the law by acquitting a criminal defendant against whom a case has been clearly proved. In both civil and criminal cases the unassailability of a jury's resolution of disputed questions of fact is well established, and this is an additional reason why those facts should be resolved in accordance with the mores of the community in which the case arose. The state and federal governments thus have a substantial interest in ensuring that the power exercised by grand and petit jurors is entrusted to persons who can be expected to have a substantial commitment to the just enforcement of the law in accordance with the mores and fabric of American life.

Although resident aliens are liable for federal and state taxation and, in general, benefit from the protection of our civil and criminal laws, their continued allegience to a foreign sovereign may cast substantial doubt upon their inclination to apply the laws of this country in the spirit and with the enthusiasm that the government and litigants have a right to expect. The relationship of a citizen of the

United States, either native born or naturalized, to this country, when compared to that of an alien to the government of the territory in which he resides, contains several elements likely to lead the citizen to feel a stronger commitment to the enforcement of the laws of the United States. Some of these were identified by Mr. Justice Rehnquist, writing in dissent in *Sugarman,* 413 U.S. at 661-2:

> Native-born citizens can be expected to be familiar with the social and political institutions of our society; with the society and political mores that affect how we react and interact with other citizens. Naturalized citizens have also demonstrated their willingness to adjust to our patterns of living and attitudes, and have demonstrated a basic understanding of our institutions, system of government, history, and traditions. It is not irrational to assume that aliens as a class are not familiar with how we as individuals treat others and how we expect "government" to treat us. An alien who grew up in a country in which political mores do not reject bribery or self-dealing to the same extent that our culture does; in which an imperious bureaucracy historically adopted a complacent or contemptuous attitude toward those it was supposed to serve; in which fewer if any checks existed on administrative abuses; in which "low-level" civil servants serve at the will of their superiors—could rationally be thought not to be able to deal with the public and with citizen civil servants with the same rapport that one familiar with our political and social mores would, or to approach his duties with the attitude that such positions exist for service, not personal sinecures of either the civil servant or his or her superior.

Citizens, as a rule, harbor positive feelings toward their sovereign and possess a sense of identity with their fellow citizens. I think it not unreasonable to believe that resident aliens may be likely to permit their positive feelings toward their foreign sovereigns and their sense of identity to their fellow-countrymen to impair their commitment to the enforcement and application of American law in those situations where our law resolves a question of public policy in a manner different from the law of the alien's sovereign, or where American law defining interpersonal relationships differs from the law of the alien's sovereign. Unlike the governments of many other nations, American government, national, state and local, is a participatory democracy. United States citizens, both native born and naturalized, are entitled to participate in the formulation of the laws of the United States and the several states through exercise of the franchise and eligibility for public office. To me, it is not unreasonable to expect that jurors who have, at least theoretically, some influence upon the content of the laws they must apply and enforce will have a greater commitment to their proper application and enforcement than those lacking such influence.

Of course, some resident aliens could be so individually constituted that their continued commitment to a foreign sovereign would not stand in the way of enthusiastic commitment to the proper enforcement and application of the laws of the United States and the several states; but this is an unidentifiable group. Unlike *knowledge* of a language, law or custom, personal commitment is not susceptible of objective measurement. Even if knowledge is established, an oath to serve as a juror in accordance with such knowledge is virtually unenforceable. An actual demonstration of personal commitment is necessary, and I can conceive

of no other form of demonstrated commitment short of naturalization, where an alien formally renounces allegiance to his previous sovereign and freely and willingly assumes allegiance to the United States, that is likely to serve the state and federal government's interest in ensuring that jurors have the proper attitude toward the enforcement of our laws.

In short, I conclude that the state and federal governments have a substantial interest in restricting eligibility for jury service to persons likely to have a personal commitment to the proper application and enforcement of the laws of the United States and the several states. The determination that resident aliens are so likely to retain ties to their fatherland that may undermine such a commitment has a sufficient basis in fact to survive the "close scrutiny" test. Therefore, I agree that the exclusion of resident aliens from service on grand and petit juries is justified by a "compelling" interest in ensuring that persons who serve as jurors are personally committed to the proper application and enforcement of the laws of the United States and the several states.

Judgment of the District Court

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MARYLAND

Civil No. 73-222-HM

LESTER L. PERKINS, D.V.M., Individually and/or for similarly situated persons and as a class action

VS

HOWARD SMITH, Clerk, Circuit Court for Montgomery County, JURY COMMISSIONER, Circuit Court for Montgomery County, MONTGOMERY COUNTY, MARYLAND, a governmental body, PAUL SCHLITZ, Clerk, United States District Court, UNITED STATES OF AMERICA, and STATE OF MARYLAND, and their successors in office or title or authority

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Pursuant to the Opinion and Order filed on January 28, 1974, it is

ORDERED AND ADJUDGED that judgment be and it is hereby entered in favor of the Defendants against the Plaintiffs for costs.

Dated at Baltimore, Maryland, this 29th day of January, 1974.

PAUL R. SCHLITZ
Clerk

By (illegible)
Deputy Clerk

TRUE COPY

DATE 1/30/74

PAUL R. SCHLITZ
Clerk

By (illegible)
Deputy Clerk

Notice of Appeal to the Supreme Court of the United States

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MARYLAND

Civil Action No. 73-222-HM

LESTER L. PERKINS, D.V.M., Individually and/or for similarly situated persons and as a class action,

Plaintiff,

v.

HOWARD SMITH, Clerk, Circuit Court for Montgomery County, JURY COMMISSIONER, Circuit Court for Montgomery County, MONTGOMERY COUNTY, MARYLAND, a governmental body, PAUL SCHLITZ, Clerk, United States District Court, UNITED STATES OF AMERICA, and STATE OF MARYLAND, and their successors in office or title or authority,

Defendants.

Notice is hereby given that the Plaintiff, Lester L. Perkins, hereby appeals to the Supreme Court of the United States from the final decision, judgment and Order of a three-judge District Court which was issued, filed and entered in this action on January 28, 1974, granting the Defendants' Motion for Summary Judgment and denying the

Plaintiff's Motion for Summary Judgment; and the judgment entered thereon.

This appeal is taken pursuant to 28 U.S.C. § 1253.

Dated this 26th day of March, 1974.

EDWARD L. GENN
8720 Georgia Avenue, Suite 202
Silver Spring, Maryland 20910
588-2820
Attorney for Plaintiff

73-1915

Supreme Court, U. S.
FILED
AUG 13 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 1915

LESTER L. PERKINS, D.V.M.,

Appellant,

v.

HOWARD SMITH, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

MOTION TO AFFIRM

FRANCIS B. BURCH,
Attorney General of Maryland,

FRANCIS X. PUGH,
Assistant Attorney General of Maryland,

Attorneys for Appellees,
Howard Smith, Clerk, Circuit Court for Montgomery County,
Robert Cuff, Jury Commissioner for Montgomery County and State of Maryland.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 1915

LESTER L. PERKINS, D.V.M.,
Appellant,

v.

HOWARD SMITH, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

MOTION TO AFFIRM

Appellees Howard Smith, Clerk, Circuit Court for Montgomery County, Robert Cuff, Jury Commissioner for Montgomery County and State of Maryland, pursuant to Rule 16 of the Rules of the Supreme Court of the United States move that the final judgment and decree of the district court be affirmed on the grounds that the issue raised by appellant does not amount to a substantial federal question and that further argument in this matter is not necessary.

STATEMENT OF THE CASE

Appellees concur in appellant's Statement of the Case except that they do not agree that appellant, being an alien, could meet all the requirements and qualifications for service as a juror in the State and Federal Courts in Maryland.

ARGUMENT

The District Court considered the various reasons advanced as justifying the exclusion of aliens from jury service — ". . . that it is reasonable to limit such service to those who participate in and manifest an interest in the affairs of citizenship, that aliens as a class will be less qualified than citizens from the standpoint of familiarity with local laws, customs and language to fully understand the actions and motives of litigants, that aliens do not owe sole and permanent allegiance to the United States, and that jury service is a unique responsibility going to the heart of representative government and as such should be entrusted only to citizens". The court then upheld the exclusionary laws, concluding that as a class citizens are more likely to make informed and just decisions than are non citizens. Circuit Judge Winter concurred on the basis of the presumed commitment of a citizen to the proper enforcement and application of the laws of the United States and of the State of Maryland. Judge Winter noted that, unlike knowledge of a language, law or custom, this commitment and possible conflicting loyalty of a non citizen, is not susceptible of objective measurement. Appellant relies heavily on *In re Griffiths*, 413 U.S. 717 (1973), and contends that ". . . the problematic impact on the justice system by resident-alien jurors is obviously neither more nor less than the impact on that system by resident-alien lawyers". This contention however overlooks this issue of possible conflicting loyalties, for the matter of the loyalty to our laws and government of an attorney, an admitted advocate of a position in a legal proceedings, is insignificant in comparison to the absolutely indispensible requirement of loyalty on the part of a juror whose role is clearly not that of an advocate.

It must be conceded that, in many instances, an alien is considered a "person" for the purpose of rights guaranteed

under the Constitution. *Graham v. Richardson*, 403 U.S. 365. However, a review of the cases so holding, as cited in footnote 5 of the District Court's decision, reveals that they have dealt with denials of economic benefits, and the cases generally note that such denials could affect the ability of aliens to enter or remain in this country, thus impinging upon an area of control expressly reserved to the Congress. The disqualification of aliens from jury service appears to have existed at common law. *Hinton v. Hinton*, 145 S.E. 615 (N.C., 1928); *Reich v. State*, 21 Am. Rep. 265 (Ga., 1874); *State v. Quarrel*, 1 Am. Dec. 637 (S.C., 1798); 24 Cyc. of Law & Practice, Juries, Sec. 9. There have been several pronouncements on this subject by this Honorable Court. In *Strauder v. West Virginia*, 100 U.S. 303 (1880), it was stated at page 310:

> "We do not say that, within the limits from which it is not excluded by the Amendment, a State may not prescribe the qualifications of its jurors, and in so doing make discriminations. It may confine the selection to males, to freeholders, to citizens, to persons within certain ages, or to persons having educational qualifications. We do not believe the 14th Amendment was ever intended to prohibit this. . . ."

In *Jugiro v. Brush*, 140 U.S. 291 (1891), this Court stated at page 298:

> "And so far as the Constitution of the United States is concerned, service upon grand and petit juries in the courts of the several States may be restricted to citizens of the United States. It rests with each State to prescribe such qualifications as it deems proper for jurymen, taking care only that no discrimination, in respect to such service, be made against any class of citizens solely because of their race. . . ."

More recently, this Court stated in *Carter v. Jury Commission of Greene County*, 396 U.S. 320 (1970) at page 332:

> "It has long been accepted that the Constitution does not forbid the States to prescribe relevant qualifi-

cations for their jurors. *The States remain free to confine the selection to citizens*, to persons meeting specified qualifications of age and educational attainment, and to those possessing good intelligence, sound judgment, and fair character. 'Our duty to protect the federal constitutional rights of all does not mean we must or should impose on states our conception of the proper source of jury lists, so long as the source reasonably reflects a cross-section of the population suitable in character and intelligence for that civic duty'." (Emphasis supplied.)

See also the reference to the identifiable class of "citizens" in *Peters v. Kiff*, 407 U.S. 493, 503 (1972); *Brown v. Allen*, 344 U.S. 443, 474 (1953); and the many cases upholding juries composed only of registered voters (and hence citizens). *United States v. Ross*, 468 F.2d 1213 (9th Circ., 1972); *Shelby v. State*, 479 S.W.2d 31 (Texas, 1972); *United States v. Bennett*, 445 F.2d 638 (9th Cir. 1971); *Green v. State*, 462 P.2d 994 (Alaska, 1969); and *Camp v. United States*, 413 F.2d 419 (5th Circ., 1969).

The District Court, in upholding the statutes in question, applied the "compelling state interest" test rather than the "rational basis" test. It appears that meeting the latter test would have sufficed. See *Hoyt v. Florida*, 368 U.S. 57 (1961), a case involving exclusions from jury service, where the Court stated at page 61:

> "Where, as here, an exemption of a class in the community is asserted to be in substance an exclusionary device, the relevant inquiry is whether the exemption itself is based on some reasonable classification and whether the manner in which it is exercisable rests on some rational foundation."

As indicated by the District Court, however, the statutes would be upheld under either test. The states may limit participation in government to those who are within the

basic conception of a political community. *Sugarman v. Dougall*, 413 U.S. 634, 642 (1973). One cannot readily envision a more direct, and sensitive, participation in government than grand and petit jury service. *Duncan v. Louisiana*, 391 U.S. 145, 186 (1968) (dissenting opinion of Justices Harlan and Stewart). In addition to the pure constitutional arguments are the practical considerations of the matter. Appellant would surely concede that many persons in his "class" are clearly unqualified, since his "class" includes, *inter alia*, persons who have only recently arrived in this country, persons who have difficulties with the English language, persons from countries hostile to the United States, and persons from backgrounds far removed from those of citizens of this country. As noted above, a test of loyalty, of familiarity with customs and practices, and of other qualities required of a juror would not be feasible. But if indeed such testing could be devised, the result would be to carve out of the class of aliens an "elitist group" of those found acceptable for jury duty. This in itself might well present constitutional problems as running contrary to the required random selection for jury duty from a fair cross-section of the community.

Finally, it should be noted that appellant has not alleged that he is, or is about to become, a litigant in a criminal or civil proceedings to be tried by a jury. Thus, he is asking for the right to serve on the jury rather than the right to be tried by a jury. The composition of a jury is normally examined in a more timely manner by a challenge to the array by a litigant in a pending jury trial.

In view of the rule of common law excluding aliens from jury service, in effect at the time of adoption of our constitution and in effect in this country at the time the applicable amendment to the constitution were ratified; in view of the aforementioned pronouncements on the matter by

this Honorable Court; and in view of the good and compelling reasons for excluding aliens as set forth above, it is respectfully submitted that appellant has not raised a substantial federal question and the decision of the lower court, therefore, should be affirmed.

CONCLUSION

Appellees respectfully submit that, in the absence of substantial question to be decided, the judgment and the decree of the district court should be affirmed.

Respectfully submitted,

FRANCIS B. BURCH,
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Supreme Court, U. S.
FILED
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No. 73-1915

In the Supreme Court of the United States

OCTOBER TERM, 1974

LESTER L. PERKINS, D.V.M., APPELLANT

v.

HOWARD SMITH, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

MOTION OF THE FEDERAL APPELLEES TO AFFIRM

ROBERT H. BORK,
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Washington, D.C. 20530.

In the Supreme Court of the United States

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

MOTION OF THE FEDERAL APPELLEES TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, the federal appellees move that the judgment of the district court be affirmed.

STATEMENT

Appellant, an alien, is a "permanent resident" of the United States now residing in Maryland.[1] Alleging that, except for his lack of citizenship, he is in all respects otherwise qualified for service on federal and Maryland grand and petit juries, he instituted this action in the

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[1]The record does not reveal when appellant entered the United States, his immigration status at that time, nor when he became eligible to seek citizenship, although he does assert that he graduated from college in 1964 and received his college training entirely in the United States (Complaint, para. 2). Appellant filed a declaration of intention to become a citizen in the United States District Court for the District of Columbia on June 14, 1971 *(ibid.)*. The filing of such a declaration is optional and has no bearing on an alien's eligibility for naturalization. See 8 U.S.C. 1445(f).

United States District Court for the District of Maryland,[2] challenging the constitutionality of federal and Maryland statutes that render him ineligible to serve on federal and state jury panels solely because of his alienage, and seeking to enjoin enforcement of the citizenship requirements thereof, on the ground that such limitations violate the equal protection and due process clauses of the Fifth and Fourteenth Amendments to the Constitution.

A three-judge district court, convened pursuant to 28 U.S.C. 2281 and 2282, after declining to certify the suit as a class action (J.S. App. 12), rejected appellant's constitutional contentions and granted appellees' motion for summary judgment (J.S. App. 21).

ARGUMENT

The district court properly entered judgment for the federal appellees and the appeal presents no substantial federal question warranting plenary review by this Court.

1. At common law, aliens were ordinarily ineligible for service on juries, both in England and in the States. See, *e.g.*, *Kohl* v. *Lehlback*, 160 U.S. 293, 300; *Hollingsworth* v. *Duane*, 4 Dall. 353 (C.C. Pa.); *Hinton* v. *Hinton*, 196 N.C. 341, 342, affirmed, 145 S.E. 615; 1 R.C.L. 802 (1914).[3] Because the Constitution's recognition of a right to trial by jury has not been regarded as incorporating the

[2]At the time he filed his complaint, appellant had resided in the State of Maryland for over fourteen months (Complaint, para. 2).

[3]In England, a limited exception had been created by statutes providing that, if an alien were a party, he could request a jury *de medietate linguae, i.e.*, a jury consisting half of aliens. See generally Forsyth, *History of Trial by Jury* 228-230 (1852); Thompson & Merriam, *Juries* 18-19 (1882). Although the right to such a jury was once recognized by statute in a few states (*e.g.*, *United States* v. *Carnot*, 2 Cranch C.C. 469, 470 (C.C.D.C.) (applying Virginia law); *United States* v. *Cartacho*, 25 Fed. Case. (No. 14,738) 312, 313 (C.C. Va.) (same)), in most jurisdictions it either was not recognized or was abolished (*e.g.*, *United States* v. *McMahon*, 4 Cranch C.C. 573 (C.C.D.C.)(Maryland law); Thompson & Merriam, *supra*, at 19), it was never adopted by Congress, and for may years it has not existed. *United States* v. *Wood*, 299 U.S. 123, 145.

common law rules concerning service of aliens on juries (cf. *Williams* v. *Florida*, 399 U.S. 78, 92-99), both the federal government and the states were free to include or exclude aliens from juries, as they chose, and in most jurisdictions the common law ineligibility of aliens for jury service remained the rule. As this Court recently observed, nearly every state now requires jurors to be citizens of the United States (*Carter* v. *Jury Comm'n*, 396 U.S. 320, 333), and a similar citizenship requirement has existed for jurors in federal court since 1948. 62 Stat. 951, as amended, 28 U.S.C. 1861, 1865(b)(1).[4]

2. For nearly a century this Court has repeatedly stated that eligibility for service on federal and state juries may be limited to citizens. *E.g.*, *Strauder* v. *West Virginia*, 100 U.S. 303, 310; *Neal* v. *Delaware*, 103 U.S. 370, 386; *In re Shibuya Jugiro*, 140 U.S. 291, 297; *Balzac* v. *Porto Rico*, 258 U.S. 298, 310; *Thiel* v. *Southern Pacific Co.*, 328 U.S. 217, 223-224, 232; *Fay* v. *New York*, 332 U.S. 261, 266, 272, 291; *Brown* v. *Allen*, 344 U.S. 443, 470-471; *Carter* v. *Jury Comm'n*, *supra*, 396 U.S. at 332-333. Aliens have never

[4]Previously, qualifications for jurors in federal courts were governed by state law. Thus the first Judiciary Act of 1789 (1 Stat. 88) provided that jurors should have the same qualifications as jurors in the state of which they were "citizens." Subsequent enactments referred to the law of the state in which the court was located. *E.g.*, 5 Stat. 394. The change in 1948 came in response to a recommendation in 1942 by the Knox Committee of the Judicial Conference (see H. Rep. No. 308, 80th Cong., 1st Sess., p. A156), which had proposed uniform federal juror qualifications, including citizenship. See Vanderbilt, *Minimum Standards of Judicial Administration* 150-153 (1949). By that time there were only a few states in which non-citizens could be jurors. See Gibson, *Aliens and the Law* 144-151 (1940). As early as 1865 Congress had required that jurors in courts in the District of Columbia be citizens. 12 Stat. 429; see 11 D.C. Code 1901 (incorporating federal court qualifications).

been held by this Court to constitute one of those "groups" in a community whose systematic and intentional exclusion deprives juries of their fundamental representative nature (see *Thiel* v. *Southern Pacific Co.*, *supra*, 328 U.S. at 220), nor has alienage been regarded as a criterion not "relevant" to the functions of a jury, and hence impermissible. *Carter* v. *Jury Comm'n*, *supra*, 396 U.S. at 332.

3. Appellant contends, in substance, that this Court's past statements concerning the permissibility of juror qualifications that exclude aliens have been entirely superseded by the recent decisions holding that various restrictions pertaining to aliens under state law constituted impermissible discrimination in violation of the equal protection clause of the Fourteenth Amendment. *Graham* v. *Richardson*, 403 U.S. 365 (emergency medical care); *Sugarman* v. *Dougall*, 413 U.S. 634 (state civil service employment); *In re Griffiths*, 413 U.S. 717 (bar membership). In fact, however, the case most in point, *Sugarman* v. *Dougall*, confirms the continued validity of state or federal laws limiting jury service to citizens.

Thus, the Court recognized in *Sugarman* the "historical power [of a state] to exclude aliens from participation in its democratic political institutions" (413 U.S. at 648), including such participation through voting, holding high public office, or employment (*id.* at 648-649), "for alienage itself is a factor that reasonably could be employed in defining [a state's] 'political community.' " *Id.* at 649.

The jury, of course, is a governmental institution of "fundamental" importance. *Duncan* v. *Louisiana*, 391 U.S. 145, 149, 153. Juries are "instruments of public justice" (*Smith* v. *Texas*, 311 U.S. 128,

130), and provide a means of "community participation in the determination of guilt or innocence" (*Duncan* v. *Louisiana*, *supra*, at 156), the development of which is closely related to "our basic concepts of a democratic society and a representative government." *Glasser* v. *United States*, 315 U.S. 60, 85. The "obligation * * * to share in the administration of justice" (*Thiel* v. *Southern Pacific Co.*, *supra*, 328 U.S. at 232 (Frankfurter, J., dissenting)), through jury service, is a "civic duty." *Brown* v. *Allen*, *supra*, 344 U.S. at 474. The jury expresses the "conscience of the community" (*Witherspoon* v. *Illinois*, 391 U.S. 510, 519), and provides an institution through which laymen may in effect operate as a branch of the government to protect against arbitrary action by the other branches of government. *Duncan* v. *Louisiana*, *supra*, 391 U.S. at 155-156.

In sum, jury service is a form of participation in the processes of democratic political institutions that, under *Sugarman* v. *Dougall*, supra, 413 U.S. at 649, may properly be limited to a "political community" consisting only of persons owing allegiance to that community. Aliens owe allegiance to a political community other than the United States. In view of the nature and functions of a jury, it is not constitutionally forbidden to require that jurors have that allegiance and commitment to the Constitution, laws and traditions of the community that is best assured by the objective requirement of citizenship. *Cf. Balzac* v. *Porto Rico*, *supra*, 258 U.S. at 310.

4. A federal requirement of citizenship for service on a federal jury would be constitutional even if a similar state requirement were not. In *Weinberger* v. *Diaz*, No. 73-1046, probable jurisdiction noted May 13,1974,

and *Hampton* v. *Mow Sun Wong*, No. 73-1596, certiorari granted June 10, 1974, we are contending that, in view of the Constitutional prerogatives of the federal government to regulate with respect to aliens, federal laws and regulations based on alienage are subject to different constitutional standards than are comparable state requirements, and may be constitutional where the latter would be invalid. Our contentions in those cases are equally applicable here.[5]

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1974.

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[5]We are sending counsel for other parties copies of our briefs in *Diaz* and *Mow Sun Wong*.

DOJ-1974-09

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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1915

LESTER L. PERKINS, D.V.M.,

Appellant,

—v.—

HOWARD SMITH, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

APPELLANT'S BRIEF IN OPPOSITION TO MOTIONS TO AFFIRM

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 73-1915

LESTER L. PERKINS, D.V.M.,

Appellant,

v.

HOWARD SMITH, et al.,

Appellees.

On Appeal from the United States
District Court for the
District of Maryland

APPELLANT'S BRIEF IN OPPOSITION TO MOTIONS TO AFFIRM

Pursuant to Rule 16(4) of the Court's Rules, the Appellant submits this brief in opposition to the Motions to Affirm filed by the respective federal and state officials, Appellees herein.

The ultimate issue in this case is whether the federal and state governments may totally exclude from eligibility for jury service all persons who, though meeting all other statutory requirements, are not citizens of the United States. The substantial question which resolution of this issue involves turns on whether this flat prohibition on eligibility for jury service by resident aliens is demonstrably more compelling and necessary than similar prohibitions against aliens practicing law, In Re Griffiths, 413 U.S. 717 (1973), or serving as state employees, Sugarman v. Dougall, 413 U.S. 634 (1973). Nothing in the respective Motions to Dismiss demonstrates that this question is anything but substantial.

The Appellees, like the three-judge court below, correctly characterize the jury system as an important institution of our system of government, but incorrectly proceed to the conclusion that, accordingly, resident aliens may automatically be excluded from that process.

In leaping to that conclusion, the Appellees fail to demonstrate that there is a necessary connection between jury service and citizenship and fail to indicate how the justifications for the exclusion accepted by the court below to support that connection differ in any significant respect from the rationales offered but rejected in Sugarman, and more particularly in Griffiths.

Similarly, the Solicitor General relies heavily on language in Sugarman indicating limits to the reach of that decision. In Sugarman, the Court suggested two areas from which the exclusion of resident aliens might not be invalid, because of the State's power "to preserve the basic conception of a political community." 413 U.S. at 647 (quoting from Dunn v. Blumstein, 405 U.S. 330, 344 (1972). The Court indicated that citizenship might be a factor in setting the qualifications for voting and also in establishing eligibility criteria for "persons holding state elective or important non-elective executive, legislative, and judicial positions," because they "perform functions that go to the heart of representative government." 413 U.S. at 647.

But the Sugarman dictum is equally important for what it did not say. Conspicuously absent from the list was any reference to jury service as an aspect of participation in the political community. This omission places in a different light the dictum in earlier cases suggesting that jury service could constitutionally be limited to citizens. E.g., Carter v. Jury Commissioners, 396 U.S. 320, 332 (1970). By the same token, the omission of jury service from the Sugarman discussion of functions related to participation in the political community makes it even more important that the clash between the principles applied in Sugarman and Griffiths and those employed by the court below be reconciled by this

Court only after plenary consideration.

CONCLUSION

For the reasons set forth herein, jurisdiction should be noted.

Respectfully Submitted,

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October 1974

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Supreme Court, U. S.
FILED
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IN THE

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Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

APPELLANT'S SUPPLEMENTAL BRIEF

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In The
SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 73-1915

LESTER L. PERKINS, D.V.M.,

Appellant,

-v.-

HOWARD SMITH, et al.,

Appellees.

On Appeal From
The United States District Court
For The District of Maryland

APPELLANT'S SUPPLEMENTAL BRIEF

The Appellant submits this Supplemental Brief to bring to the Court's attention a recent decision of the United States District Court for the District of Maryland, entitled Taggart v. Mandel, ____ F.Supp. ____, 43 Law Week ____ (Civil Action No. N-73-738, 3/27/75), a copy of which is appended. The Taggart

decision was rendered in the same court which rendered the decision below, and by a court composed of two judges who participated in the instant case.

In Taggart, the three-judge court unamimously ruled that a Maryland statute, which required applicants for appointment to the State Constitutional Office of Notary Public to be United States citizens, unconstitutionally denied the plaintiff there, a lawful resident alien, the equal protection of the laws. In the instant case, the three-judge court reached the opposite conclusion with respect to the Maryland and federal statutes limiting eligibility to jury service to United States citizens. Virtually the same rationales for the discrimination against aliens which were accepted by the three-judge court in this case were rejected in the Taggart opinion, which barely noted the earlier decision in the instant case. The ruling in Taggart provides additional reason for the Court to note jurisdiction in this case.

Finally, we would also note that the Court has ordered re-argument in Hampton v. Mow Sun Wong, No. 73-1596, which involves the closely related question of the constitutionality of the prohibition against employment of aliens by the federal government. Consideration of the issues in this case together with those in Hampton v. Mow Sun Wong would appear to be appropriate.

CONCLUSION

For the reasons set forth herein, jurisdiction should be noted.

Respectfully submitted,

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May 1975

Attorneys for Appellant

APPENDIX

IN THE UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF MARYLAND

MARGARET ELIZABETH TAGGART	:	
	:	
v.	:	Civil
	:	Action
THE HONORABLE MARVIN MANDEL,	:	No.
Governor of the State of Maryland,	:	N-73-738
and THE HONRABLE FRED WINELAND,	:	
Secretary of State	:	
	:	

Filed: March 27, 1975.

Three-judge court hearing before Winter, Circuit Judge, and Northtop (Chief Judge) and Watkins, District Judges.

Harold Buchman and Harry A. E. Taylor, of Baltimore, Maryland, for plaintiff.

Francis B. Burch, Attorney General of Maryland, Fred Oken, Assistant Attorney General of Maryland, Chief, Civil Division, and David H. Feldman, Assistant Attorney General of Maryland, of Baltimore, Maryland, for defendants.

Northrop, Chief District Judge.

Plaintiff, Margaret Elizabeth Taggart, a legal permanent resident alien, instituted this action seeking a declaratory judgment that MD. ANN. CODE art. 68, §1(b) (1970) is unconstitutional under the equal protection clause of the fourteenth amendment insofar as it requires applicants for appointment to

the State constitutional office of Notary Public to be citizens of the United States.[1] She has further requested that this Court permanently enjoin defendants from further enforcing that statutory requirement. The defendants are the Governor of the State of Maryland, who has, among the other powers of his office, the power to appoint and remove notaries public, MD. ANN. CODE art. 68, §§1(a) and 2, and the Secretary of the State

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1 MD. ANN. CODE art. 68, §1(b)(1970) provides as follows:

> (b) Qualifications.--Every person appointed shall be at least eighteen (18) years of age, of good moral character and integrity, a citizen of the United States, a resident in this State for a period of two (2) years prior to appointment, and a resident of the senatorial district and subdistrict from which he or she is appointed. The residence requirements shall not apply to persons having an appointment as an official court reporter by any court of any county or Baltimore City. [Emphasis added.]

In her Complaint in this action, plaintiff also challenged the constitutionality of the two-year residency requirement contained in section 1(b). However, she was subsequently appointed an official court reporter for the Supreme Bench of Baltimore City and thus is now exempt from that requirement. See MD. ANN. CODE art. 68 §1(b), supra. That challenge, therefore, has been withdrawn.

of Maryland, who is responsible for the preparation of application forms for appointment as a notary public, and who is the person with whom such applications are filed and is responsible for giving the applicant notice of any action taken thereon. MD. ANN. CODE art. 68, §§1(c) and (g).[2]

Plaintiff's action is alleged to arise under the first, fifth and fourteenth amendments of the Constitution and under 42 U.S.C. §§1981 and 1983. This Court has jurisdiction under 28 U.S.C. §§1343(3) and (4), and it has the power to issue the requested declaratory judgment under 28 U.S.C. §§2201 and 2202. Upon a finding by the single District Court Judge to whom this case was originally assigned that the constitutional question presented was not insubstantial, a three-judge District Court was convened pursuant to 28 U.S.C. §2281, and a hearing held. Inasmuch as there are no disputed facts, the case is now before this Court for its decision on the parties' cross-motions for summary judgment. See Fed. R. Civ. P. 56.

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2 The Secretary of State is also empowered to establish certain fees in connection with applications for appointment as a notary public and he has the responsibility to forward the initial commission, and any subsequent notices of renewal thereof, to each successful applicant. MD. ANN. CODE art. 68, §§1(e) and (f).

THE FACTS

Section 45 of Article IV of the Maryland Constitution provides for the appointment of notaries public "in the manner, for the purpose, and with the powers" prescribed by law. That section is implemented by the provisions of MD. ANN. CODE art. 68 (1970), entitled "Notaries Public." Pursuant thereto, notaries public in Maryland are empowered to administer oaths in all matters of a civil nature and to certify that fact under a notarial seal as sufficient evidence of having administered such oath, MD. ANN. CODE art. 68, §3 (Cum. Supp. 1974), to receive proof or acknowledgment of all instruments of writing relating to commerce or navigation and such other writings as have been usually proved and acknowledged before notaries public, and to make protests and declarations respecting negotiable instruments and testify the truth thereof under seal concerning all matters done by virtue of his office. MD. ANN. CODE art. 68, §4 (1970). In Moser v. Howard County Board, 235 Md. 279, 201 A.2d 365 (1964), the Maryland Court of Appeals held that the office of notary public in Maryland was a public office for profit, and while noting that the duties of the office were more limited in common law countries than in civil law countries, the Court nonetheless stated that they were "important and essential." Id., 235 Md. at 282.

Notaries public in Maryland are appointed by the Governor upon application endorsed

by the State Senator representing the district in which the applicant resides. MD. ANN. CODE art. 68, §1(a). Such appointments are generally for a term of four years and they may be renewed from term to term. MD. ANN. CODE art. 68, §§1(d) and (e). In order to qualify for appointment, each applicant must be at least eighteen years of age, of good moral character and integrity, a citizen of the United States, a resident of Maryland for a period of two years prior to appointment, and a resident of the senatorial district and subdistrict from which he or she is appointed. MD. ANN. CODE art. 68, §1(b). The citizenship requirement contained in §1(b) was first adopted in 1801, see An Act Respecting Public Notaries in this State, Md. Laws ch. 86, §2 (1801), and has been carried down to the present date. See, e.g., MD. ANN. CODE art. 68, §1 (Flack ed. 1939); MD. ANN. CODE art. 68, §1 (Bagby ed. 1924); MD. CODE art. 68, §1 (Poe ed. 1888); MD. CODE art. 67, §1 (1860).

Miss Taggart is a 24-year old native of Ireland. She first arrived in this country on June 25, 1971, and is a legal permanent resident alien, holding Alien Registration No. A30-755-397. She has been a resident of the State of Maryland and of the City of Baltimore since March, 1973, and on July 16, 1973, she filed her intention to become a citizen of the United States.[3]

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3 See 8 U.S.C. §1445(f).

Upon first arriving in this country in 1971, Miss Taggart proceeded to St. Cloud, Minnesota, where she enrolled at the St. Cloud Business College. After her graduation from that institution as a stenotypist in March, 1973, Miss Taggart moved to Baltimore, Maryland, where she was employed by the Accelerated Reporting Service. On September 20, 1973, she was appointed an official court reporter with the Supreme Bench of Baltimore City, and she has held that position up to the present time.

An important aspect of Miss Taggart's work, first as a stenotypist with the Accelerated Reporting Service and subsequently as an official court reporter, is an ability to take sworn depositions. In order to undertake that task, however, it is necessary that she be able to notarize such depositions. In April, 1973, Miss Taggart therefore expressed her interest in becoming a notary public to State Senator Robert L. Dalton. The latter subsequently wrote a letter to the office of the Attorney General of Maryland setting forth Miss Taggart's position and inquiring if it was possible to make an exception to the citizenship and residency requirements of MD. ANN. CODE art. 68, §1(b). In a letter dated May 30, 1973, Henry R. Lord, Deputy Attorney General of Maryland, replied that a pending application for United States citizenship did not comply with the unambiguous mandate of §1(b), and he suggested that a person disqualified from applying for a notary position because of a lack of United States citizenship might want to seek a judicial remedy in a suit

testing whether the requirement violates the equal protection clause of the United States Constitution. Plaintiff subsequently initiated the instant action on July 23, 1973.

During the preliminary stages of this case, defendants took the position that there was no actual case or controversy present inasmuch as plaintiff had never formally filed an application for appointment as a notary public. This Court thereafter suspended any further proceedings pending the outcome on a formal application to be submitted by Miss Taggart. After some delays which are not relevant here, Miss Taggart's formal application, endorsed by Senator Dalton, was forwarded to the Secretary of State of Maryland on February 20, 1974. In response to a request for advice with respect to the completed application, the Office of the Attorney General of Maryland advised the Secretary of State by letter dated May 31, 1974, of its position that the citizenship requirement of §1(b) was not violative of the equal protection clause of the fourteenth amendment. By a subsequent letter dated June 26, 1974, the defendant Secretary of State informed Miss Taggart of the defendant Governor's decision not to approve her application in view of the explicit citizenship requirement contained in §1(b).

DISCUSSION

In support of her position that the citizenship requirement of MD. ANN. CODE art. 68, §1(b) is violative of the equal protection

clause of the fourteenth amendment, plaintiff cites the recent decisions by the Supreme Court in Sugarman v. Dougall, 413 U.S. 634, 93 S. Ct. 2842 (1973) and In re Griffiths, 413 U.S. 717, 93 S. Ct. 2851 (1973). In those cases, the Supreme Court held respectively that a provision of New York's civil service law that only citizens could hold permanent positions in the competitive class of the state civil service and that a Connecticut court rule restricting admission to the bar to citizens were violative of the equal protection clause. According to plaintiff, those decisions clearly established the principle that classifications based on alienage are inherently suspect and "subject to close judicial scrutiny." In re Griffiths, supra, 413 U.S. at 721-22, 93 S. Ct. at 2854-55; Sugerman, supra, 413 U.S. at 642, 93 S. Ct. at 2847. See also Graham v. Richardson, 403 U.S. 365, 372, 91 S. Ct. 1848, 1852 (1971). Thus, in order to justify its use of a suspect classification in the instant case she contends that the State must show "that its purpose or interest is both constitutionally permissable and substantial, and that its use of the classification is 'necessary ... to the accomplishment' of its purpose or the safeguarding of its interest." In re Griffiths, supra, 413 U.S. at 721-22, 93 S. Ct. at 2855. She submits that the various grounds raised by defendants in support of the instant classification cannot withstand the requisite scrutiny.

Defendants, however, contend that the decisions cited by plaintiff are inapposite as they dealt solely with the constitutionality of broad state restrictions relating

to welfare and employment of aliens. In contrast, they point out that in the instant case we are dealing primarily with the scope of the plenary power of the State of Maryland under the tenth amendment to the United States Constitution to prescribe the qualifications for a State constitutional public office and "to preserve [its] basic conception of a political community." Sugerman, supra, 413 U.S. at 647, 93 S. Ct. at 2850, citing Dunn v. Blumstein, 405 U.S. 330, 344, 92 S. Ct. 995, 1004 (1972).

It is their position that in such a situation equal protection analysis is wholly inapplicable. Instead, they contend that this Court should consider such factors as the unique legal status of aliens, the explicit constitutional preferences for citizens, the distinctive responsibilities of the office of notary public, the long history of the challenged limitation, and the apparently near universal similar practice of other states.

In this regard, defendants note that in Sugerman, supra, the Supreme Court expressly stated that it was not holding in that case "that a State may not, in an appropriately defined class of positions, require citizenship as a qualification for office." 413 U.S. at 647, 93 S. Ct. at 2850. Moreover, they emphasize the fact that the Court reiterated its prior language from Boyd v. Thayer, 143 U.S. 135, 161, 12 S. Ct. 375, 382 (1892), to the effect that "[e]ach State has the power to prescribe the qualifications of its officers and the manner in which they shall be

chosen." Sugerman, supra, 413 U.S. at 647, 93 S. Ct. at 2850.

From all of the above, defendants conclude that utilization of a classification based on alienage in the instant situation was well within the constitutional prerogatives of the State of Maryland, and that its long-standing legislative judgment in that regard should be accorded authoritative deference without reference to any equal protection principles which might otherwise apply.

In a somewhat related argument, defendants further contend that equal protection analysis should not be applied to the instant case inasmuch as eligibility for appointment to a State constitutional office should properly be considered a privilege of national citizenship. Thus, defendants note that the fourteenth amendment itself distinguishes between the special privileges or immunities of citizens and those rights pertaining to all "persons" within the jurisdiction of the United States. See Sugerman, supra, 413 U.S. at 652-53, 93 S. Ct. at 2862-63 (Rehnquist, J., dissenting). According to defendants, the test as to whether a particular right is a privilege or immunity of national citizenship is whether it is one of those "which owe their existence to the Federal government, its national character, its Constitution, or its laws." Slaughter-House Cases, 16 Wall. 36, 79, 21 L. Ed. 394, 409 (1873). Since the power to prescribe qualifications for appointment to a State political office

is reserved to the States under the tenth amendment, defendants conclude that the right to hold a state office is one "that reasonably can be said to appertain to that special relationship which exists between citizens and their national government." Defendants' Memorandum at 20.

A somewhat similar argument to those of defendants in the instant case was advanced in In re Griffiths, supra, in support of the proposition that aliens could lawfully be excluded from admission to the Connecticut bar. The Supreme Court was not forced to decide the issue in that case, however, as it found that the appellees therein had failed to establish that a lawyer was an "office holder" in the traditional sense. Id., 413 U.S. at 727-29 & n. 21, 93 S. Ct. at 2858 & n.21.

In the instant case it would appear that the Maryland constitutional office of notary public is a public office, see Moser v. Howard County Board, 235 Md. 279, 201 A.2d 365 (1964), and that a notary public in Maryland is an "office holder" in the traditional sense. However, this Court is not persuaded that that fact, either alone or when considered in conjunction with the specific responsibilities of the office and the lengthy history of the challenged limitation, is sufficient to exempt State qualifications with respect thereto from the purview of the equal protection clause--although it might provide a basis in an appropriate case for applying a less exacting standard of judicial scrutiny. See Sugerman, supra, 413 U.S. at 648, 93 S. Ct. at 2850.

Thus, in Snowden v. Hughes, 321 U.S. 1, 6-7, 64 S. Ct. 397, 400 (1944), the Supreme Court expressly held that the right to become a candidate for state office was a right or privilege of state citizenship, and not of national citizenship. See also Egan v. City of Aurora, Ill., 365 U.S. 514, 514-15, 81 S. Ct. 684, 685 (1961)(per curiam); Thomas v. Mims, 317 F.Supp. 179, 181 (S.D. Ala. 1970); Heiser v. Rhodes, 305 F. Supp. 269, 272 (S.D. Ohio 1969); Bacon v. Holzman, 264 F. Supp. 120, 124 (N.D. Ill. 1967), rev'd sub nom. Briscoe v. Kusper, 435 F.2d 1046 (7th Cir. 1970).

Moreover, while the Supreme Court has confirmed that a State has a broad latitude in prescribing the qualifications of its public office holders, as well as in regulating its own elections, see Sugerman, supra, 413 U.S. at 647, 93 S. Ct. at 2850, it has never indicated that such power was wholly unfettered. Thus, in Turner v. Fouche, 396 U.S. 346, 362, 90 S. Ct. 532, 541 (1970), the Supreme Court recognized the existence of a correlative "federal constitutional right to be considered for public service without the burden of invidiously discriminatory disqualifications." In that case, in overturning a Georgia statutory requirement that school board members be freeholders, the Court went on to state that:

> [t]he State may not deny to some the privilege of holding public office that it extends to others on the basis of distinctions that violate federal constitutional guarantees. [Id., 396 U.S. at 362-63, 90 S. Ct. at 541.]

Even in Sugerman, supra, itself, the Court noted that the State's exercise of its powers in prescribing the qualifications of its officers was "not wholly immune from scrutiny under the Equal Protection Clause." Id., 413 U.S. at 648, 93 S. Ct. at 2850. Thus, it stated as follows:

> We recognize a State's interest in establishing its own form of government, and in limiting participation in that government to those who are within "the basic conception of a political community." Dunn v. Blumstein, 405 U.S. 330, 344, 92 S.Ct. 995, 1004, 31 L.Ed.2d 274 (1972). We recognize, too, the State's broad power to define its political community. But in seeking to achieve this substantial purpose, with discrimination against aliens, the means the State employs must be precisely drawn in light of the acknowledged purpose. [Id., 413 U.S. at 642-43, 93 S. Ct. at 2848.]

See also Bullock v. Carter, 405 U.S. 134, 140-41, 92 S. Ct. 849, 854-55 (1972); Chimento v. Stark, 353 F. Supp. 1211, 1213 (D.N.H.), aff'd, 414 U.S. 802, 94 S. Ct. 125 (1973); Walker v. Yucht, 352 F. Supp. 85, 89 (D. Del. 1972).

Thus, notwithstanding defendants' able arguments to the contrary, this Court holds that the State of Maryland's legislative determination to exclude aliens from the State constitutional office of notary public is not exempt from judicial scrutiny under the equal

protection clause. The only remaining question then is whether the standard of scrutiny to be applied is the strict standard for which plaintiff contends or the more traditional rational basis standard which defendants favor. In view of this Court's opinion that the instant limitation must fall even when considered in light of the more lenient rational basis standard, it does not feel that it is necessary to decide which standard would otherwise be the appropriate one to consider. Therefore, it will proceed to consider the challenged classification solely to determine whether it is based on grounds which are relevant to the achievement of a valid state objective. See Turner v. Fouche, supra, 396 U.S. at 362, 90 S. Ct. at 541; McGowan v. Maryland, 366 U.S. 420, 425-26, 81 S. Ct. 1101, 1105 (1961).

Defendants submit that the instant classification is reasonable in that it imposes only a limited restriction[4] on an "important non-

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4 In this regard, defendants contend that not only is the instant disqualification narrowly confined to a specific public office (compare the broad applicability of the restriction challenged in Sugarman, supra), but also that it is only temporary in nature since alienage is not an immutable status. There is, however, no de minimis rule with respect to violations of constitutional rights, and unless the qualification is otherwise constitutional, the fact that it is not a permanent bar is irrelevant.

elective ... judicial position." See Sugerman, supra, 413 U.S. at 647, 93 S. Ct. at 2850. In this regard, they particularly emphasize the fact that a notary public is an impartial agent of the State, and that in the performance of his duties he exercises that portion of the State's sovereign power which is delegated to him. See Moser v. Howard County Board, supra, 235 Md. at 283. Under such circumstances, and considering the important responsibilities of a notary public in administering oaths, defendants contend that it is important to limit holders of the office to persons owing allegiance to the United States. Furthermore, they contend that citizens, being more familiar with the language and customs of this country, would be better able to carry out the various functions of the office. Finally, defendants again submit that the long history of the instant qualification in Maryland, while not dispositive, is prima facie evidence of its reasonableness, especially when considered in conjunction with the nearly universal similar practice of the other states.

While this Court is aware that "[t]he presumption of reasonableness is with the State," Salsburg v. Maryland, 346 U.S. 545, 553 & n.9, 74 S. Ct. 280, 284 & n.9 (1954), Wilson v. Moore, 346 F.Supp. 635, 640 (N.D. W.Va. 1972), Thompson v. Whitley, 344 F.Supp. 480, 483-84 (E.D.N.C. 1972), it is not persuaded that the position of notary public is one "where citizenship bears some rational relationship to the special demands of the particular position." See Dougall v. Sugerman, 339 F. Supp. 906, 911 (S.D.N.Y. 1971)(Lumbard, J., concurring), aff'd, 413 U.S. 634, 93 S. Ct. 2842 (1973). Thus, this Court notes that the

various functions of a notary public are largely ministerial in nature, and it feels that they are qualitatively indistinguishable from those functions of an attorney to which the Supreme Court accorded such short shrift in In re Griffiths, supra, 413 U.S. at 724, 93 S. Ct. at 2856:

> It in no way denigrates a lawyer's high responsibilities to observe that the powers "to sign writs and subpoenas, take recognizances, [and] administer oaths" hardly involve matters of state policy or acts of such unique responsibility as to entrust them only to citizens.

While it may be asserted that the above language was merely dicta, it can hardly be seriously argued that notaries public either "participate directly in the formulation, execution, or review of broad public policy," Sugerman, supra, 413 U.S. at 647, 93 S. Ct. at 2850, or that they "perform functions that go to the heart of representative government." Id.; compare Perkins v. Smith, 370 F. Supp. 134 (D. Md. 1974), appeal pending, No. 73-1915 (jury service).

In response to defendants' contention that aliens would be more likely to swear falsely than citizens would be, there is no evidence before this Court, nor would it accept any, that aliens as a class are inherently any less trustworthy than citizens. While it might be desirable for various reasons to have only persons owing allegiance to this country in oath-administering offices

such as that of notary public, such an end can be adequately achieved by the requirement of an oath of office.[5] See MD. CONST. art. I, §6; MD. ANN. CODE art. 70, §7 (1970); cf. Torcaso v. Watkins, 223 Md. 49, 162 A.2d 438 (1960), rev'd on other grounds, 367 U.S. 488, 81 S. Ct. 1680 (1961). Moreover, with respect to detection of specific instances of false swearing, this Court notes ~~that~~ notaries are required to keep complete registers of all protests and other official acts, MD. ANN. CODE art. 68, §5, thus permitting a full review of their actions, and they are subject to removal from office for misconduct or other good cause, MD. ANN. CODE, art. 68, §2.

In this regard, this Court further notes that there is apparently no comparable citizenship requirement for appointment to the State constitutional offices of coroner (post-mortem examiner), see MD. ANN. CODE art. 22, §§1-9 (1973), or elisor, both of which are created in the same constitutional provisions creating the office of notary public. MD. CONST. art. IV, §45. Similarly, there is apparently no citizenship requirement for appointment to other equally important nonelective judicial offices such as that of Deputy Clerk of Court, see MD. CONST. art. IV, §26, or official court reporter.

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5 Cf. In re Griffiths, supra, 413 U.S. at 725-726 & n.18, 93 S. Ct. at 2857 & n.18.

In light of the largely ministerial nature of the tasks of a notary public, this Court is similarly unpersuaded by the argument that citizens, being more familiar with the customs and language of this country, would be better able to carry out the duties of the office. Compare Perkins v. Smith, supra, 370 F. Supp. at 138. Moreover, to the extent that the State feels that familiarity with the language and customs of this country is a necessary qualification for the position of notary public, the equal protection clause demands that it choose some criteria of selection more narrowly confined to that end. In re Griffiths, supra, 413 U.S. at 725, 93 S. Ct. at 2856. See Perkins v. Smith, supra, 370 F. Supp. at 140 (Winter, J., concurring).

Finally, this Court is unable to conclude that either the fact that the instant requirement is of a long-standing duration, or that most of the other states impose a similar limitation, has any significant bearing on the reasonableness of the requirement. Thus, this Court notes that prior to the Supreme Court's decision in In re Griffiths, supra, most states also excluded aliens from admission to the bar. Concepts of equal protection, like those of due process, are not static over time, and this Court is not bound by out-moded concepts which are no longer relevant to today's society.

In conclusion, and after full consideration of all the arguments advanced by defendants in support of the instant classification, this Court finds that Maryland's statutory requirement that applicants for the State

constitutional office of notary public be citizens is wholly unrelated to the achievement of any valid State objective, and thus that it is in violation of the equal protection clause of the fourteenth amendment.

For the reasons set forth hereinabove it is this 27th day of March, 1975, by the United States District Court for the District of Maryland, ORDERED as follows:

1. That the plaintiff's Motion for Summary Judgment BE, and the same hereby IS, GRANTED; and

2. That the defendants' Motion for Summary Judgment BE, and the same hereby IS, DENIED.

Harrison L. Winter
United States Circuit Judge

Edward S. Northrop
Chief United States District Judge

R. Dorsey Watkins
United States District Judge